

Ex parte communications regarding solely matters of board procedure or practice are not prohibited by this section.

§821.62 Procedures for handling ex parte communication.

A Board employee who receives or who makes or knowingly causes to be made a communication prohibited by §821.61 shall place on the public record of the proceeding:

- (a) All such written communications;
- (b) Memoranda stating the substance of all such oral communications; and
- (c) All written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (a) and (b) of this section.

§821.63 Requirement to show cause and imposition of sanction.

(a) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of §821.61, the Board, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his or her claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(b) The Board may, to the extent consistent with the interests of justice and the policy of the underlying statutes it administers, consider a violation of this subpart sufficient grounds for a decision adverse to a party who has knowingly committed or knowingly caused a violation to occur. Alternatively, the Board may impose sanction, including suspension of the privilege of practice before the Board, on the party's attorney or representative, where an infraction has been committed by that attorney or representative and penalizing the party represented is not in the interest of justice.

[42 FR 21613, Apr. 28, 1977, as amended at 59 FR 59050, Nov. 15, 1994]

Subpart K—Judicial Review of Board Orders

§821.64 Judicial review.

(a) *General.* Judicial review of a final order of the Board may be sought as provided in section 1006 of the Act (49 U.S.C. 46110) and section 304(d) of the Independent Safety Board Act of 1974 (49 U.S.C. 1153) by filing a petition for review with the appropriate United States court of appeals within 60 days of the date of entry (service date) of the Board's order. Under the Federal Aviation Act, as amended, any party may appeal the Board's decision. The Board itself does not typically participate in the judicial review of its action. In matters appealed by the FAA, respondents should anticipate the need to make their own defense.

(b) *Stay pending judicial review.* No petition for stay pending judicial review will be entertained if it is received by the Board after the effective date of the Board's order. If a stay action is to be timely, any petition must be filed sufficiently in advance of the effective date of the Board's order to allow for the possibility of a reply and to allow for Board review.

[59 FR 59050, Nov. 15, 1994]

PART 825—RULES OF PROCEDURE FOR MERCHANT MARINE APPEALS FROM DECISIONS OF THE COMMANDANT, U.S. COAST GUARD

Sec.

- 825.1 Applicability.
- 825.5 Notice of appeal.
- 825.10 Referral of record.
- 825.15 Issues on appeal.
- 825.20 Briefs in support of appeal.
- 825.25 Oral argument.
- 825.30 Action by the Board.
- 825.35 Action after remand.
- 825.40 Ex parte communications.

AUTHORITY: Sec. 304(a)(9)(B), Independent Safety Board Act of 1974, Pub. L. 93-633, 88 Stat. 2169 (49 U.S.C. 1903(a)(9)(B)).

SOURCE: 40 FR 30248, July 17, 1975, unless otherwise noted.

§ 825.1 Applicability.

The provisions of this part govern all proceedings before the National Transportation Safety Board (Board) on appeals taken from decisions, on or after April 1, 1975, of the Commandant, U.S. Coast Guard, sustaining orders of an administrative law judge, revoking, suspending, or denying a license, certificate, document, or register in proceedings under:

- (a) R.S. 4450, as amended (46 U.S.C. 239);
- (b) Act of July 15, 1954 (46 U.S.C. 239a-b); or
- (c) Section 4, Great Lakes Pilotage Act (46 U.S.C. 216(b)).

§ 825.5 Notice of appeal.

(a) A party may appeal from the Commandant's decision sustaining an order of revocation, suspension, or denial of a license, certificate, document, or register in proceedings described in § 825.1, by filing a notice of appeal with the Board within 10 days after service of the Commandant's decision upon the party or his designated attorney. Upon good cause shown, the time for filing may be extended.

(b) Notice of appeal shall be addressed to the Docket Clerk, National Transportation Safety Board, Washington, DC 20594. At the same time, a copy shall be served on the Commandant (GL), U.S. Coast Guard, Washington, DC 20590.

(c) The notice of appeal shall state the name of the party, the number of the Commandant's decision, and, in brief, the grounds for the appeal.

§ 825.10 Referral of record.

Upon receipt of a notice of appeal, the Commandant shall immediately transmit to the Board the complete record of the hearing upon which his decision was based. This includes the charges, the transcript of testimony, and hearing proceedings (including exhibits), briefs filed by the party, the decision of the administrative law judge, and the Commandant's decision on appeal. It does not include intra-agency staff memoranda provided as advice to the Commandant to aid in his decision.

§ 825.15 Issues on appeal.

The only issues that may be considered on appeal are:

- (a) A finding of a material fact is erroneous;
- (b) A necessary legal conclusion is without governing precedent or is a departure from or contrary to law or precedent;
- (c) A substantial and important question of law, policy, or discretion is involved; or
- (d) A prejudicial procedural error has occurred.

§ 825.20 Briefs in support of appeal.

(a) Within 20 days after the filing of a notice of appeal, the appellant must file, in the same manner as prescribed for the notice in § 825.5, a brief in support of the appeal.

(b) This document shall set forth:

- (1) The name and address of the appellant;
- (2) The number and a description of the license, certificate, document, or register involved;
- (3) A summary of the charges affirmed by the Commandant as proved;
- (4) Fact findings by the Commandant disputed by the appellant;
- (5) Specific statements of errors of laws asserted;
- (6) Specific statements of any abuse of discretion asserted; and
- (7) The relief requested.

(c) Objection based upon evidence of record need not be considered unless the appeal contains specific record citation to the pertinent evidence.

(d) When a brief has been filed by appellant under this section, the Coast Guard may, within 15 days of service of the brief on the Commandant, submit to the Board a reply brief.

(e) If a party who has filed a notice of appeal does not perfect the appeal by the timely filing of an appeal brief, the Board may dismiss the appeal on its own initiative or on motion of the Coast Guard.

§ 825.25 Oral argument.

(a) If any party desires to argue a case orally before the Board, he should request leave to make such argument in his brief filed pursuant to § 825.20.

(b) Oral argument before the Board will normally not be granted unless the

National Transportation Safety Board

§ 825.40

Board finds good cause for such argument. If granted, the parties will be advised of the date.

§ 825.30 Action by the Board.

(a) On review by the Board, if no reversible error is found in the Commandant's decision on appeal, that decision will be affirmed.

(b) On review by the Board, if reversible error is found in the Commandant's decision on appeal, the Board may:

(1) Set aside the entire decision and dismiss the charges if it finds the error incurable; or

(2) Set aside the order, or conclusions, or findings of the Commandant and remand the case to him for further consideration if it finds the error curable.

(c) When a matter has been remanded to the Commandant under paragraph (b) of this section, the Commandant may act in accordance with the terms of the order of remand, or he may, as appropriate, further remand the matter to the administrative law judge of the Coast Guard who heard the case, or to another administrative law judge of the Coast Guard, with appropriate directions.

§ 825.35 Action after remand.

When a case has been remanded under § 825.30, a party shall retain all rights of review under 46 CFR part 5 and this part, as applicable.

§ 825.40 Ex parte communications.

(a) As used in this section:

Board decisional employee means a Board Member or employee who is or who may reasonably be expected to be involved in the decisional process of the proceeding;

Ex parte communication means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this part.

(b) The prohibition of paragraph (c) of this section shall apply from the time a proceeding is noticed for hear-

ing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibition shall apply at the time of the acquisition of such knowledge.

(c) Except to the extent required for the disposition of ex parte matters as authorized by law:

(1) No interested person outside the Board shall make or knowingly cause to be made to any Board employee an ex parte communication relevant to the merits of the proceeding;

(2) No Board employee shall make or knowingly cause to be made to any interested person outside the Board an ex parte communication relevant to the merits of the proceeding.

Ex parte communications regarding solely matters of Board procedure or practice are not prohibited by this paragraph.

(d) A Board employee who receives or who makes or knowingly causes to be made a communication prohibited by paragraph (c) of this section, shall place on the public record of the proceeding:

(1) All such written communications;

(2) Memoranda stating the substance of all such oral communication; and

(3) All written responses, and memoranda stating the substance of all oral responses, to materials described in paragraphs (d) (1) and (2) of this section.

(e) Upon receipt of a communication knowingly made or caused to be made in violation of paragraph (c) of this section, the Board may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his or her interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(f) The Board may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the Board, consider a violation of this section sufficient grounds for a decision adverse to a party who has knowingly committed

such violation or knowingly caused such violation to occur.

(Authority: Sec. 4, Government in the Sunshine Act, Pub. L. 94–409, amending 5 U.S.C. 556 (d) and 5 U.S.C. 557; Independent Safety Board Act of 1974, Pub. L. 93–633, 88 Stat. 2166 (49 U.S.C. 1901 *et seq.*))

[42 FR 21614, Apr. 28, 1977]

PART 826—RULES IMPLEMENTING THE EQUAL ACCESS TO JUSTICE ACT OF 1980

Subpart A—General Provisions

Sec.

- 826.1 Purpose of these rules.
- 826.2 When the Act applies.
- 826.3 Proceedings covered.
- 826.4 Eligibility of applicants.
- 826.5 Standards for awards.
- 826.6 Allowable fees and expenses.
- 826.7 Rulemaking on maximum rates for attorney fees.
- 826.8 Awards against the Federal Aviation Administration.

Subpart B—Information Required From Applicants

- 826.21 Contents of application.
- 826.22 Net worth exhibit.
- 826.23 Documentation of fees and expenses.
- 826.24 When an application may be filed.

Subpart C—Procedures for Considering Applications

- 826.31 Filing and service of documents and general procedures.
- 826.32 Answer to application.
- 826.33 Reply.
- 826.34 Comments by other parties.
- 826.35 Settlement.
- 826.36 Further proceedings.
- 826.37 Decision.
- 826.38 Board review.
- 826.39 Judicial review.
- 826.40 Payment of award.

AUTHORITY: Section 203(a)(1) Pub. L. 99–80, 99 Stat. 186 (5 U.S.C. 504).

SOURCE: 46 FR 48209, Oct. 1, 1981, unless otherwise noted.

Subpart A—General Provisions

§ 826.1 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504 (the Act), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain adminis-

trative proceedings (adversary adjudications) before the National Transportation Safety Board (Board). An eligible party may receive an award when it prevails over the Federal Aviation Administration (FAA), unless the Government agency's position in the proceeding was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that this Board will use to make them. As used hereinafter, the term "agency" applies to the FAA.

§ 826.2 When the Act applies.

The Act applies to any adversary adjudication identified in § 826.3 as covered under the Act.

[59 FR 30531, June 14, 1994]

§ 826.3 Proceedings covered.

(a) The Act applies to certain adversary adjudications conducted by the Board. These are adjudications under 5 U.S.C. 554 in which the position of the FAA is presented by an attorney or other representative who enters an appearance and participates in the proceedings. Proceedings to grant or renew certificates or documents, hereafter referred to as "licenses," are excluded, but proceedings to modify, suspend, or revoke licenses or to impose a civil penalty on a flight engineer, mechanic, pilot, or repairman (or person acting in that capacity) are covered if they are otherwise "adversary adjudications." For the Board, the type of proceeding covered includes (but may not be limited to) aviation enforcement cases appealed to the Board under sections 501, 609, 611 and 901 of the Federal Aviation Act (49 U.S.C. 44101 *et seq.*, 44720–44711, 44715, 46301).

(b) The Board may also designate a proceeding not listed in paragraph (a) as an adversary adjudication for purposes of the Act by so stating in an order initiating the proceeding or designating the matter for hearing. The Board's failure to designate a proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the Act;